

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs August 15, 2006

STATE OF TENNESSEE v. RAYMOND KURT BRYANT

Direct Appeal from the Criminal Court for Davidson County
No. 93-B-501 Steve R. Dozier, Judge

No. M2005-02467-CCA-R3-CD - Filed September 26, 2006

The defendant, Raymond Kurt Bryant, appeals the trial court's revocation of his probation and reinstatement of his original sentences for three counts of attempted aggravated sexual battery, the original sentences, three four-year terms, to be served consecutively. The defendant argues that because the sentences in two counts had expired, the trial court could not reinstate them. We agree that only the third of the consecutive sentences had not expired and, thus, only it could be reinstated. Accordingly, we reverse the trial court's reinstatement of the sentences in Counts 1 and 2 but affirm the reinstatement of the unexpired four-year sentence in Count 3 and remand for entry of corrected judgments.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part,
Reversed in Part, and Remanded**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and J.S. DANIEL, SR. J., joined.

Jeffrey A. DeVasher, Assistant Public Defender (on appeal), and Kyle Mothershead, Assistant Public Defender (at trial), for the appellant, Raymond Kurt Bryant.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In April 1993 the defendant was indicted for twelve counts of aggravated sexual battery and subsequently pled guilty on August 12, 1993, to three counts of the lesser offense of attempted aggravated sexual battery (Counts 1-3), and the remaining counts were dismissed. He was sentenced

to consecutive four-year terms for each count, with two years to be served in the county workhouse at 100% and the remaining ten years on probation.

On August 19, 2002, the trial court issued a probation violation warrant alleging the defendant attempted to use another person's urine during a random drug screen and failed to produce his own specimen. Following a hearing on October 4, 2002, the trial court reinstated the defendant's probation. A second probation violation warrant was issued on January 27, 2003, as a result of the defendant's arrest for assault, resisting arrest, evading arrest, and driving on a suspended license, with the trial court again reinstating the defendant to four years probation on April 2, 2003. A third warrant was issued on September 5, 2003, based on the defendant's failure to report, positive drug screen, and failure to pay his probation fees.

At the August 12, 2005, probation revocation hearing, George Herron of the Board of Probation and Parole testified that he supervised the defendant's drug screen in July 2003 and that the defendant disappeared from the lobby while his sample was being tested, the results of which were positive for marijuana. Herron said the defendant was moved to absconder status in September 2003 as a result of his failure to report but agreed that the defendant had reported monthly during the eight-year period from 1995, when he was first placed on probation, until 2003. He also said that all of the defendant's drug tests during that eight-year period were negative.

The thirty-seven-year-old defendant testified that he served two years of his twelve-year sentence and began his probation in 1995. Regarding his first probation violation in 2002, he acknowledged that he attempted to use another person's urine for his drug screen, explaining that he had done so because he was taking the prescription drug, Lortab, for a back injury although he did not have a prescription for it. He said he started using marijuana in 2003 because he was depressed as a result of his divorce and loss of his job. He said that because he knew he was "dirty" when he submitted his drug screen in 2003, he "got spooked" and left to go to Oklahoma where he had family. He admitted that his drug screen was positive, that he stopped reporting, and that he left the jurisdiction. He acknowledged that he was driving with a suspended license when he was arrested on the third violation warrant.

At the conclusion of the hearing, the trial court took the matter under advisement and subsequently entered an order on September 1, 2005, revoking the defendant's probation and placing his original twelve-year sentence into effect based upon the defendant's positive drug screen and his absconding from the state for almost two years. Subsequently, the defendant filed a motion to reduce illegal sentence, contending that the sentences for Counts 1 and 2 had expired, the result being that the trial court could not reinstate those sentences. The trial court denied the motion.

ANALYSIS

The defendant appeals the trial court's reinstatement of the entire, original sentence, arguing that two of the four-year sentences had expired prior to the court's issuance of a probation violation

warrant and, therefore, the court did not have authority to reinstate either expired sentence. The State agrees with the defendant, as do we.

The governing statute on this issue is Tennessee Code Annotated section 40-35-310, which provides:

The trial judge shall possess the power, at any time within the maximum time which was directed and ordered by the court for such suspension, after proceeding as provided in § 40-35-311, to revoke and annul such suspension, and in such cases the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension, and shall be executed accordingly; provided, that in any case of revocation of suspension on account of conduct by the defendant which has resulted in a judgment of conviction against the defendant during the defendant's period of probation, the trial judge may order that the term of imprisonment imposed by the original judgment be served consecutively to any sentence which was imposed upon such conviction.

Our supreme court has interpreted this statute to mean “that if a defendant successfully completes a probationary sentence, the trial court is without authority to revoke probation and order service of the original sentence.” State v. Hunter, 1 S.W.3d 643, 646 (Tenn. 1999). When a defendant is serving consecutive suspended sentences on probation, the trial court may only revoke those suspended sentences that have not already been served in full. See State v. Anthony, 109 S.W.3d 377, 380-81 (Tenn. Crim. App. 2001). However, if a trial court issues a probation violation warrant, “the expiration of a term of probation is stayed by the filing of [the] warrant, and the probationary term remains in effect until the trial court rules on the violation warrant.” Id. at 381-82 (emphasis omitted).

In the present appeal, since the trial court first issued a probation violation warrant more than nine years after imposing the defendant’s three consecutive four-year sentences, the first two sentences had already expired and could not be reinstated. The trial court retained authority under section 40-35-310 only to revoke the third of the four-year sentences.

CONCLUSION

We reverse the trial court’s reinstatement of the original sentences in Counts 1 and 2, affirm the reinstatement of the four-year unexpired sentence in Count 3, and remand to the trial court for entry of corrected judgments.

ALAN E. GLENN, JUDGE